

LIBRARY

COURT. U. S.

Office-Supreme Court, U.S.  
**FILED**

NOV 19 1962

JOHN F. DAVIS, CLERK

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A.D. 1962

---

**No. 283**

---

WARD LANE, as Warden of the Indiana State Prison,  
*Petitioner.*

*v.*

UNITED STATES OF AMERICA EX REL.,  
GEORGE ROBERT BROWN,  
*Respondent,*

---

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

**PETITIONER'S BRIEF**

---

EDWIN K. STEERS,  
Attorney General of Indiana

WILLIAM D. RUCKELSHAUS,  
Assistant Attorney General  
*Attorneys for Petitioner*

219 State House,  
Indianapolis 4, Indiana  
ME 3-5512

## INDEX

	Page
Table of Authorities Cited.....	ii
Opinion Below .....	1
Jurisdiction .....	2
Constitutional Provisions and Statutes Involved.....	2
Question Presented .....	5
Concise statement of	
The Case .....	5
Argument .....	9
Conclusion .....	22

## TABLE OF AUTHORITIES CITED

### CASES

Page

<i>Bandy v. United States</i> (8th Cir. 1960), 278 F. 2d 214, 364 U. S. 477.....	15
<i>Barber v. Gladden</i> (1957), 210 Ore. 46, 298 P. 2d 986, 309 P. 2d 192.....	17
<i>Betts v. Brady</i> (1942), 316 U. S. 455; 462.....	19
<i>Brown v. State</i> (1958), 239 Ind. 184, 154 N.E. (2d) 720	17
<i>Brown v. State</i> (1961), — Ind. —, 171 N.E. (2d) 825 .....	11, 21
<i>Burns v. Ohio</i> (1959), 360 U. S. 252.....	16
<i>Cash v. United States</i> (D.C.C.A. 1958), 261 F. 2d 731. 14, 15	
<i>Coppedge v. United States</i> (1962), — U. S. —, 82 S. Ct. 917 .....	19
<i>Ellis v. United States</i> (1958), 356 U. S. 674.....	19
<i>Eskridge v. Washington State Board of Prison Terms and Paroles</i> (1958), 357 U. S. 214.....	16
<i>Farley v. United States</i> (1957), 354 U. S. 521.....	19
<i>Griffin v. Illinois</i> (1956), 351 U. S. 12.....	14, 16
<i>Jackson v. Reeves</i> (1958), 238 Ind. 708, 153 N.E. (2d) 603 .....	11, 21
<i>Johnson v. United States</i> (1957), 334 U. S. 521.....	19
<i>McCrary v. State</i> (1961), — Ind. —, 173 N.E. (2d) 300 .....	11, 17, 21
<i>O'Rourke v. United States</i> (1st Cir. 1957), 248 F. 2d 812; (Cert. denied), 356 U. S. 922.....	14
<i>Palko v. Connecticut</i> (1937), 302 U. S. 319, 325.....	19
<i>Smith v. Bennett</i> (1961), 365 U. S. 708.....	16, 17
<i>State ex rel. Casey v. Murray</i> (1952), 231 Ind. 74, 106 N.E. (2d) 911 .....	11

	Page
<i>State ex rel. Fulton v. Schannen</i> (1945), 224 Ind. 55, 58, 64 N.E. (2d) 798.....	10
<i>State v. Lewis</i> (1960), — Wash. —, 349 P. 2d 438 .....	15
<i>Willoughby v. State</i> (1961), — Ind. —, 177 N.E. (2d) 465 .....	11, 17, 21

## STATUTES

Indiana Acts 1945, Ch. 38, as found in Burns' Indiana Statutes, Sections 13-1401 to 13-1406.....	2-4, 9, 10
---	------------

## PERIODICALS

Appellate Review for Indigent Criminal Defendants in the Federal Courts, 26 U. Chi. L. Rev. 454.....	15
---	----

IN THE  
**SUPREME COURT OF THE UNITED STATES**

OCTOBER TERM, A.D. 1962

---

**No. 283**

---

WARD LANE, as Warden of the Indiana State Prison,  
*Petitioner.*

*v.*

UNITED STATES OF AMERICA EX REL,  
GEORGE ROBERT BROWN,  
*Respondent,*

---

ON PETITION FOR CERTIORARI TO THE COURT OF APPEALS  
FOR THE SEVENTH CIRCUIT

---

**PETITIONER'S BRIEF**

---

**Opinion Below**

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 302 Fed. 2d (7th Cir. 1962), 537.

The opinion of the United States District Court for the Northern District of Indiana, South Bend Division, is reported in 196 Fed. Supp. 484.

### **Jurisdiction**

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on the 4th day of May, 1962.

On Petition for Certiorari to the United States Court of Appeals for the Seventh Circuit, this case was docketed July 28, 1962.

The jurisdiction of this Court was invoked under provision of 28 U.S.C. Sec. 1254 (1).

The Writ of Certiorari was granted by this Court on October 8, 1962.

### **Constitutional Provisions and Statutes Involved**

The constitutional provision involved is as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Fourteenth Amendment of the Constitution of the United States, Section I.

The statutory provisions involved are as follows:

1. Indiana Acts 1945, Ch. 38, Sec. 1, as found in Burns' Indiana Statutes, Section 13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve

at the pleasure of said court, for a term of four [4] years. He shall be a resident of the state of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

2. Indiana Acts 1945, Ch. 38, Sec. 2, as found in Burns' Indiana Statutes, Section 13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

3. Indiana Acts 1945, Ch. 38, Sec. 3, as found in Burns' Indiana Statutes, Section 13-1403:

"The public defender shall be provided with a seal of his office on which shall appear the words 'Public Defender, State of Indiana.' The public defender shall have the power to take acknowledgements, and administer oaths, and do all other acts now authorized by law for notary publics. Provided, each of said acts shall be attested by his official seal."

4. Indiana Acts 1945, Ch. 38, Sec. 4, as amended, and as found in Burns' Indiana Statutes, Section 13-1404:

"The public defender shall be paid an annual salary to be fixed by the supreme court of this state. He may, with the consent of said court, appoint or employ such deputies, stenographers or other clerical help as may be required to discharge his duties at compensation to be fixed by the court. He shall be provided with an office at a place to be located

and designated by the Supreme Court, and he shall be paid his actual necessary and reasonable traveling expenses, including cost of food and lodging when away from the municipality in which his office is located on business of the office of the public defender, and he shall be provided with office furniture, fixtures and equipment, books, stationery, printing services, postage and supplies."

5. Indiana Acts 1951, Ch. 132, Sec. 2, as found in Burns' Indiana Statutes, Section 13-1404a:

"Notwithstanding the provisions of any other law enacted by the 87th General Assembly, there is hereby appropriated annually out of funds of the state not otherwise appropriated a sufficient amount to pay salaries and expenses authorized by this act."

6. Indiana Acts 1945, Ch. 38, Sec. 5, as found in Burns' Indiana Statutes, Section 13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

7. Indiana Acts 1945, Ch. 38, Sec. 6, as found in Burns' Indiana Statutes, Section 13-1406:

"All claims for salary or other expenses authorized by this act shall be allowed and approved by the Supreme Court. There is hereby appropriated annually out of funds of the state not otherwise appropriated a sufficient amount to pay salaries and expenses authorized by this act."

## **Question Presented**

The sole question presented is:

1. Did the District Court and the Court of Appeals err in finding that Respondent herein, an indigent, had been denied due process and/or equal protection of law under the Fourteenth Amendment to the United States Constitution because the State of Indiana conditioned his right to appeal from a denial of his Writ of Error Coram Nobis upon a determination of his appeal's merit by the Public Defender?

## **Concise Statement of the Case**

### **A.**

#### **Nature of the Case and Its Disposition in the District Court**

This action was initiated by a Petition for Writ of Habeas Corpus brought on July 19, 1961, by the Respondent to contest the legality of his detention in the Indiana State Prison by Warden, Ward Lane. (R. 10) Petitioner was ordered by the District Court to show cause on or before July 25, 1961, why the writ should not issue. Hearing was held on July 26, 1961, and after oral argument the District Court found in a written opinion that Respondent had been denied equal protection of the laws by the State of Indiana and ordered a full appellate review of Respondent's Coram Nobis denial by the State of Indiana within ninety (90) days of the date of that Court's order, and further ordered a stay of Respondent's execution. (R. 57)

It appearing that no action had been taken by the State of Indiana to comply with the District Court's July 26, 1961 determination, the District Court on November 10, 1961,

ordered Petitioner to show cause why Respondent should not be released at a hearing to be held November 16, 1961. (R. 69) After hearing, the District Court issued its order granting Respondent's Writ of Habeas Corpus, but remanded Respondent back to the custody of Petitioner pending this appeal. Petitioner filed his Notice of Appeal and Petition for Certificate of Probable Cause which was granted by the Judge of the District Court.

The case was docketed and heard by the Court of Appeals for the Seventh Circuit, and that Court rendered its opinion on May 4, 1962, in favor of Respondent. (R. 76) Thereafter, Petitioner filed his Petition for Certiorari with this Court and it was granted on October 8, 1962.

### **Petition for Writ of Habeas Corpus**

This cause was initiated in the District Court by the filing of a Verified Petition for Writ of Habeas Corpus. The petition alleged that Respondent was tried, and convicted, of MURDER IN THE PERPETRATION OF ROBBERY and sentenced to death in the Lake County Criminal Court and his Motion for New Trial was overruled in February, 1958. (R. 11) Petitioner, Respondent herein, perfected a timely appeal to the Indiana Supreme Court and the judgment of the lower court was affirmed. (R. 11)

Thereafter a Petition for a Writ of Certiorari was denied by the Supreme Court of the United States. (R. 11) In February, 1960 Respondent sought a Writ of Habeas Corpus in the District Court for the Northern District of Indiana. (R. 11) Said petition was dismissed for failure to exhaust State remedies. (R. 12)

Respondent then sought a Writ of Error Coram Nobis in the Lake County Indiana Criminal Court. (R. 13) The

Indiana Public Defender appeared on behalf of Respondent in this proceeding. After a hearing the writ was denied by the Lake County Court. (R. 13) Respondent sought an appeal from this denial and having been unsuccessful in eliciting the support of the Public Defender, filed a motion in the Lake County Court to appoint counsel and furnish the transcript of record. (R. 13) The Lake County Court denied this motion in July, 1960. (R. 13) Respondent thereupon filed a Verified Petition for a Writ of Mandate in the Indiana Supreme Court praying that Court to direct the Lake County Court to appoint him counsel and furnish him a transcript. This petition was denied by the Indiana Supreme Court in February, 1961. (R. 13) Respondent filed a Writ of Certiorari in the United States Supreme Court in March, 1961. This petition was denied in June, 1961, without prejudice to his application for a Writ of Habeas Corpus in the appropriate United States District Court. (R. 14) Whereupon Respondent filed a Petition for Writ of Habeas Corpus in the District Court on July 19, 1961, from which this present cause originates. (R. 10)

Respondent's writ was based on five (5) grounds. The only ground that is before this Court is Ground Five (5), as that was the basis of the District and Circuit Courts' orders. That is that Respondent has been denied equal protection of the law, in that he was effectively denied an appeal from the order of the Lake County, Indiana Criminal Court, because of his poverty and inability to secure a transcript, which right of appeal is available to all defendants in Indiana who can afford the expense of a transcript.

### **Hearing and Order**

In the hearing on July 26, 1961, oral argument was heard by the District Court, and the State was ordered in an

opinion to give Respondent a full appellate review within ninety (90) days of the issuance of the order. (R. 57-63)

### **Return, Show Cause, and Final Order**

Petitioner filed a Return on August 29, 1961, certifying the cause of Respondent's detention to be certain commitments issuing from the Lake County Criminal Court on December 13, 1957, whereby Respondent was sentenced to death for having committed the crime of murder in the first degree in the perpetration of robbery. (R. 63)

No action was taken by the State to comply with the District Court's order. The District Court held a hearing for Petitioner to show cause why Respondent should not be released on November 16, 1961. (R. 69) Oral arguments were heard and the District Court ordered the Respondent discharged, but remanded back in custody pending appeal to the Seventh Circuit Court of Appeals. (R. 71)

Petitioner filed his Notice of Appeal on November 16, 1961, and Amended Notice of Appeal on November 24, 1961. (R. 73)

On December 26, 1961, the record was filed with the Clerk of the United States Court of Appeals for the Seventh Circuit, and that Court rendered its decision on May 4, 1962. (R. 76)

The Supreme Court of the United States granted certiorari to the Seventh Circuit Court of Appeals on October 8, 1962, and set the case for argument following No. 201. (R. 84)

## ARGUMENT

**Indiana has not, by the Operation of its law, denied:  
respondent in this cause the equal protection or  
due process of law as guaranteed by the Four-  
teenth Amendment to the United States  
Constitution.**

The fact situation in this cause is not disputed. Respondent, as an indigent, must apply to the Public Defender of the State of Indiana in order to perfect an appeal from a denial of a Writ of Error Coram Nobis in the trial court. The question before this Court, as posed by the District and Circuit Courts' decisions, is whether this fact has denied the Respondent equal protection or due process under the Fourteenth Amendment to the Constitution of the United States.

The function of the Office of Public Defender of Indiana is defined both by statute and case law. The Indiana Public Defender statute, Indiana Acts of 1945, Ch. 38, Secs. 1 to 6, p. 81, as found in Burns' Indiana Statutes (1956 Repl.), Sections 13-1401 to 13-1406, reads in part as follows:

13-1401:

"There is hereby created the office of Public Defender. The public defender shall be appointed by the Supreme Court of the State of Indiana to serve at the pleasure of said court, for a term of four [4] years. He shall be a resident of the State of Indiana and a practicing lawyer of this state for at least three [3] years. The Supreme Court is authorized to give such tests as it may deem proper to determine the fitness of any applicant for appointment."

13-1402:

"It shall be the duty of the public defender to represent any person in any penal institution of this state who is without sufficient property or funds to employ his own counsel, in any matter in which such person may assert he is unlawfully or illegally imprisoned, after his time for appeal shall have expired."

13-1405:

"The public defender may order on behalf of any prisoner he represents a transcript of any court proceeding, including evidence presented, had against any prisoner, and depositions, if necessary, at the expense of the state, but the public defender shall have authority to stipulate facts contained in the record of any court, or the substance of testimony presented or evidence heard involving any issue to be presented on behalf of any prisoner, without the same being fully transcribed."

It can thus be seen that the Public Defender is appointed by the Supreme Court of the State of Indiana to represent indigent prisoners after their time for appeal has expired. He is authorized to pay for transcripts of any court proceeding for any prisoner he represents. This procedure is peculiar to Indiana. The purpose of the statute has been described by the Supreme Court of Indiana as follows:

"\* \* \* The purpose of the statute is to provide legal aid at public expense for those who voluntarily seek and otherwise could not obtain the advice and assistance of a competent attorney. \* \* \*"

*State ex rel. Fulton v. Schannen* (1945), 224 Ind. 55, 58, 64 N. E. (2d) 798.

Decisions of the Indiana Supreme Court have made it clear that where an indigent desires to take an appeal from an adverse decision in a post-conviction remedy, such as *coram nobis*, he must first obtain the assistance of the Public Defender.

*State ex rel. Casey v. Murray* (1952), 231 Ind. 74, 106 N. E. (2d) 911;

*Brown v. State* (1961), — Ind. —, 171 N. E. (2d) 825;

*Willoughby v. State* (1961), — Ind. —, 177 N. E. (2d) 465.

The Public Defender has been given wide discretion in deciding whether the matters complained of present any appealable issue.

*Jackson v. Reeves* (1958), 238 Ind. 708, 153 N. E. (2d) 603;

*State ex rel. Casey v. Murray* (1952), 231 Ind. 74, 106 N. E. (2d) 911.

In *McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300, at page 306, the Supreme Court of Indiana said:

“The Public Defender is not required to make a travesty of his office by preparing and filing an appeal which after proper investigation, he believes to be frivolous or without such merit as he could in good conscience present to this court for consideration. While it is the duty of the Public Defender to present, in favor of the prisoners whom he undertakes to represent, by every honorable and ethical means available, every remedy or defense that is authorized by law, this does not mean that he must violate ethical standards and his conscience by interposing defenses and prosecuting appeals in which

there is no good faith or reasonable basis for such action. *State ex rel. White v. Hilgemann*, 1941, 218 Ind. 572, 578, 579, 34 N. E. 2d 129.

"The Public Defender is governed by the same rules of legal ethics as are lawyers generally, and when he has made a thorough investigation of the case, as was done here, and found no errors or omission which would, in the conscience of an ethical lawyer, furnish merit for an appeal, he properly exercised his discretion in refusing to spend the public's money to pursue it further. *Ellis v. United States*, supra, 1958, 356 U. S. 674, 78 S. Ct. 974, 2 L. Ed. 2d 1060; *Brown v. State*, Ind. 1961, 171 N. E. 2d 825, supra."

In the present cause, the Public Defender appeared on Respondent's behalf in the Lake County Criminal Court in his hearing on the Coram Nobis writ. (R. 40) However, the Public Defender declined to represent the Respondent in his appeal from the denial of his Writ of Error Coram Nobis in the following words:

"That Relator then requested the Public Defender to represent him in perfecting an appeal to the Indiana Supreme Court from the order of the Trial Court overruling and denying his coram nobis petition, but said Public Defender refused to do so in the following letter to Relator:

"After a careful review of your hearing had on June 1 on your petition for Writ of Error Coram Nobis in the Criminal Court of Lake County, will advise that I am unable to find any error or errors that would have any merit to assign upon an appeal; therefore, I am hereby informing you that my office will not appeal the judgment denying your Petition for Writ of Error Coram Nobis.

"I have talked to the Chief Deputy Attorney General and he informed me that in the event my office refuses to perfect an appeal for you and if you are a pauper, and allege these facts in any petition you file in the Federal Court, the Attorney General will concede that you have exhausted your state remedies. I have no authority to appear for you in the Federal Court but I believe the Federal Judge might appoint counsel for you.

"Due to the above facts, I am closing my file on your case.

"Yours truly,

"Robert S. Baker

"Public Defender of Indiana."

(R. 40-41)

It is the legal power of the Public Defender to make this decision, and its consequent effect on Respondent's right to appeal from his Coram Nobis proceeding that the District and Circuit Courts decided was a denial of equal protection and due process to Respondent.

Petitioner concedes that if Respondent has sufficient funds, he could buy a transcript of the hearing on his Coram Nobis Writ in the Lake County Criminal Court. If he could not secure counsel, he could appeal *pro se*. The State of Indiana has thus, through its laws, both statutory and decisional, created a classification between indigents and non-indigents for the purpose of belated appeals and the Writs of Coram Nobis and Habeas Corpus. If the mere creation of such a classification for the purpose of appeals is a violation of the "equal protection" clause, then assuredly the Indiana law is so violative. Petitioner respectfully

submits that such a classification is not a violation of equal protection under the Fourteenth Amendment to the United States Constitution. Just such a classification was contemplated by Justice Frankfurter in *Griffin v. Illinois* (1956), 351 U. S. 12, when, in his concurring opinion, he stated at page 24:

“ . . . When a State not only gives leave for appellate correction of trial errors but must pay for the cost of its exercise by the indigent, it may protect itself so that frivolous appeals are not subsidized and public moneys not needlessly spent. The growing experience of reforms in appellate procedure and sensible, economic modes for securing a review still to be devised, may be drawn upon to the end that the State will neither bolt the door to equal justice nor support a wasteful abuse of the appellate process.”

Judge Prettyman has spoken to the same effect in *Cash v. United States* (D.C.C.A. 1958), 26 F. 2d 731:

“It is sad but true that nobody can supply to the poor every privilege possessed by the well-to-do. Every indigent cannot be afforded defense by one of the most skilled, most experienced lawyers at the bar. People who have the money and wish to spend it for a foolish, useless litigation can do so. No principle, either legal or moral, implies that the public ought to supply indigents with the costs of foolish or useless litigation. . . .”

Other jurisdictions have held that a classification may be made between indigents and non-indigents for the purposes of appeal.

*O'Rourke v. United States* (1st Cir. 1957), 248 F. 2d 812; (Cert. denied), 356 U. S. 922.

*Bandy v. United States* (8th Cir. 1960), 278 F. 2d 214, 364 U. S. 477, Judgment vacated and remanded;

*State v. Lewis* (1960), — Wash. —, 349 P. 2d 438.

To say that such a classification may be made is not the same as saying that it may be made with no basis in rationality other than the fact of an individual's poverty. The classification must be founded on reason to escape the proscription of the equal protection clause.

*Cash v. United States* (D.C.C.A. 1958), 261 F. 2d 731.

The ultimate rationality in any judicial system creating a sifting or screening process for indigent appeals is to protect the Appellate Courts from becoming overburdened with frivolous appeals taken at public expense. There is also an attendant policy against the harassment of public officials who must resist such appeals.

It is Petitioner's position that the mere fact that Indiana has classified indigents and non-indigents is not a denial of equal protection, as the classification is imbued with the quality of reasonableness. Therefore, the question that arises is whether the process created by Indiana law would deny an indigent possessing a meritorious claim an adequate appellate review. The argument thus shifts from equal protection to "fairness" or "due process".

See: *Appellate Review for Indigent Criminal Defendants in the Federal Courts*, 26 U. Chi. L. Rev. 454.

The above interpretation does not run afoul of the Supreme Court decisions cited in the District and Circuit Courts' decisions below. (R. 54 and R. 76)

*Griffin v. Illinois* (1956), 351 U. S. 12, *Burns v. Ohio* (1959), 360 U. S. 252, and *Smith v. Bennett* (1961), 365 U. S. 708, were all cases where the sole factor precluding appellate review was the defendants' indigency. There was no attempt made on the part of any of the states there involved to sift non-meritorious appeals of indigents. A denial of equal protection in these cases does not require such a conclusion in the present cause. The classification is as shown above made on the basis of a rational state policy, and not an arbitrary one of indigency.

In *Eskridge v. Washington State Board of Prison Terms and Paroles* (1958), 357 U. S. 214, the Supreme Court held that the State of Washington denied Appellant therein, an indigent, his constitutional rights under the Fourteenth Amendment by conditioning his appeal on the approval of the trial judge. While the language in *Eskridge* is not without ambiguity, Petitioner submits that it is just as rational to interpret the holding in terms of "due process" as "equal protection." The Court was not saying that the classification itself was unconstitutional, but it was done in such a way as to operate unfairly on indigent defendants. To impose on a trial judge the burden of deciding upon the merits of an appeal is to work an unfairness on an indigent. The judge must overrule a motion for a new trial and in the next breath agree that justice will thereby be served by allowing defendant an appeal. The quite natural distaste with which a trial judge views an appellate reversal argues against cloaking him with the power to initiate the appellate process. However, in the case of the Public Defender in Indiana, the argument cuts the other way. The Public Defender in this case has represented the potential Respondent in the lower court. If error has been committed, he will have a vested interest in seeing that it

is corrected. Where any appealable error is noted, he is not likely to shrink from raising it on appeal.

It is submitted that the opinion of the Public Defender, as to a meritorious cause, comes closer to a reasonable substitute for adequate appellate review than does that of the trial judge.

*Eskridge* is distinguishable from the present case on yet another ground. The Appellant in *Eskridge* was seeking a review of his original conviction. No appellate review court had ever looked at the facts surrounding his conviction. In this cause, Respondent had a full review of his original conviction.

*Brown v. State* (1958), 239 Ind. 184, 154 N. E. (2d) 720.

Such a review for indigents, as well as non-indigents, has been long held to be a constitutional right in Indiana.

*McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300;

But see *Willoughby v. State* (1961), — Ind. —, 177 N. E. (2d) 465.

An appeal from a denial of a Writ of Error Coram Nobis on the other hand has been held by the Supreme Court of the State of Indiana to be a matter of grace.

*McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300.

Petitioner is aware of the fact that similar arguments have been dismissed or obliquely criticized in other cases.

*Smith v. Bennett* (1961), 365 U. S. 708;

*Barber v. Gladden* (1957), 210 Ore. 46, 298 P. 2d 986, 309 P. 2d 192.

It is respectfully submitted that where a state had created certain post-conviction remedies whereby a convicted man may test the constitutionality of his conviction, in the case of indigents, it has the right to call a halt to the indiscriminate appeal from the denial of such remedies. To hold otherwise, at least as the law now stands in Indiana, would be to allow a convicted man to bring endless appeals from frivolously filed writs in the lower courts.

Petitioner, therefore, submits that on the grounds of due process or fairness, *Eskridge* is distinguishable from the present case.

Petitioner further submits to this Court that the entire process of screening non-meritorious appeals from indigent defendants in Indiana is not a denial of due process.

What is the unfairness of which Respondent complains and the District and Circuit Courts below affirmed? Respondent had counsel at his hearing on his Petition for Writ of Error Coram Nobis. His attorney reviewed the record and advised him that there was no merit to an appeal. Thus far, Respondent is in no different position than is a man of wealth, whose attorney has advised him likewise. Here, however, their positions change. A non-indigent can buy a transcript and appeal *pro se*. He must appeal *pro se* because presumably he would not be able to procure an attorney to prosecute a frivolous appeal. To decide that a non-indigent could obtain an attorney would be to presume that the decision of his attorney, as to merit, was erroneous and inferentially that the Public Defender's decision was likewise erroneous. It would seem only logical, in discussing the constitutionality of a given state network of laws, as they bear on an individual, to presume that the laws work as they are supposed to and not to

presume their malfunction. There has, to date, been no showing that there was any merit to Respondent's appeal, and that the Public Defender's decision was in error. The decisions of the courts below necessarily presume error in the decision of the Public Defender.

The distinction then between Respondent and a man of wealth is that the latter could, by himself, face the Supreme Court of Indiana with a non-meritorious appeal. It hardly seems that the denial of this privilege by the State of Indiana is such as to amount to a "denial of fundamental fairness, shocking to the universal sense of justice," *Beets v. Brady* (1942), 316 U. S. 455, 462, or "implicit in the concept of ordered liberty," *Palko v. Connecticut* (1937), 302 U. S. 319, 325.

The United States Supreme Court has recently clarified the procedure in the Federal Courts for appellate review of convictions of indigent defendants.

*Coppedge v. United States* (1962), — U. S. —, 82 S. Ct. 917.

*Coppedge* clarifies the earlier decisions of *Johnson v. United States* (1957), 334 U. S. 521; *Farley v. United States* (1957), 354 U. S. 521; and *Ellis v. United States* (1958), 356 U. S. 674. In *Coppedge*, the initial determination, as to the frivolity of an appeal, after the District Court has found a lack of "good faith", lies with the Circuit Court and is made on the basis of the certificate of the District Judge and "what is usually the *pro se* pleading of a layman." *Coppedge v. United States, supra*, at page 921. If, from the face of the papers filed, the indigent Appellant's appeal is not clearly frivolous, the Court of Appeals is to grant an appeal in forma pauperis. The Court then goes on to say at page 921:

“ \* \* \* If, on the other hand, the claims made or the issues sought to be raised by the applicant are such that their substance cannot adequately be ascertained from the face of the defendant's application, the Court of Appeals must provide the would-be appellant both with the assistance of counsel and a record of sufficient completeness to enable him to attempt to make a showing that the District Court's certificate of lack of 'good faith' is in error and that leave to proceed with the appeal *in forma pauperis* should be allowed. If, with such aid the applicant then presents any issue for the court's consideration not clearly frivolous, leave to proceed *in forma pauperis* must be allowed.”

The Court of Appeals thus appoints an attorney to show whether there is any error in the District Judge's certificate. Presumably, if this court-appointed attorney says there is no error, that is the end of it. In Indiana, the Legislature has built into its system of post-conviction appeals such an attorney. When he says there is no merit to an appeal, that is the end of it. Granted in all cases he does not say this directly to the Supreme Court of Indiana, as the attorney appointed, according to *Coppedge*, relates his determination to the Circuit Court, but its practical effect on the indigent Appellant is the same. He has not received the same review as an Appellant who could afford to buy a transcript. In *Coppedge*, the Supreme Court apparently saw no denial of due process to an indigent just because his treatment was not the same in all particulars to a non-indigent. It is respectfully submitted that the lack of equivalence of treatment between indigents and non-indigents in Indiana likewise does not deprive a non-indigent of fundamental fairness.

The Public Defender's decision in Indiana is not always unreviewable. His decision not to appeal has been reviewed by issuing him a show cause order in two cases: once on remand from the Supreme Court of the United States, *McCrary v. State* (1961), — Ind. —, 173 N. E. (2d) 300; and once on a Petition for Rehearing on a Writ of Mandate filed, seeking to have the trial court ordered to provide Petitioner with a transcript. *Willoughby v. State* (1961); — Ind. —, 177 N. E. (2d) 465. Such a review was not provided Respondent in this case.

*Brown v. State* (1961), — Ind. —, 171 N. E. (2d) 825.

The Supreme Court has never stated their reason for issuing a show cause order to the Public Defender, but apparently the order is to review an alleged dereliction of duty by the Public Defender.

*Jackson v. Reeves* (1958), 238 Ind. 708, 153 N. E. (2d) 603.

Such review, as is granted by the Supreme Court of the Public Defender's decisions, shows that the Public Defender works under the watchful eye of the Supreme Court, and in a very real sense, acts as an arm of the highest court in Indiana. He is appointed by the Supreme Court of Indiana, and they fix and pay his salary.

Indiana Acts of 1945, Ch. 38, Secs. 1 to 6, p. 81, as found in Burns' Indiana Statutes (1956 Repl.), Sections 13-1401 to 13-1406, *supra*.

## CONCLUSION

Indiana has attempted to establish an equitable system for allowing indigent defendants an appeal from the denial of post-conviction writs, while at the same time balancing the interests of the State against frivolous writs filed at State's expense. It is admitted that this procedure, like any human procedure, is not perfect. But it is strongly contended that the imperfections are not so fundamental as to violate the Fourteenth Amendment to the Constitution of the United States.

WHEREFORE, Petitioner respectfully submits that this Court reverse the decision of the court below, and remand the case to the District Court of the Northern District of Indiana to hear the remainder of allegations in Petitioner's Writ of Habeas Corpus.

Respectfully submitted,

EDWIN K. STEEPS,  
Attorney General of Indiana

WILLIAM D. RUCKELSHAUS,  
Assistant Attorney General  
*Attorneys for Petitioner*

219 State House,  
Indianapolis 4, Indiana  
ME 3-5512